Filed 10/17/16 Marriage of Munoz-Sanchez and Macias CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re the Marriage of MARISA MUNOZ-SANCHEZ and ANGELO DAVID MACIAS.	C080365
MARISA MUNOZ-SANCHEZ, Respondent, v. ANGELO DAVID MACIAS, Appellant.	(Super. Ct. No. 05FL06011)

Angelo Macias, an inmate serving a sentence of 25 years to life in prison, appeals from a domestic violence restraining order (DVRO) protecting his ex-wife Marisa Munoz-Sanchez and her children. Macias contends the restraining order is void because it was issued by a court commissioner without his consent.

Because Macias failed to participate at the hearing, he is not a "party litigant" who must consent to having a cause tried by a commissioner. Further, although Macias was incarcerated at the time of the hearing and could not attend in person, the record fails to show that he ever attempted to retain or secure appointed counsel, nor did he ever request to appear telephonically. We affirm.

FACTS

Macias and Munoz-Sanchez were previously married and have a daughter, A.M., who was 11 years old in 2015. Their marriage was dissolved in 2007.

Macias has a significant criminal history. In 1994, he was convicted of attempted murder, assault with a firearm, and shooting at an occupied dwelling and sentenced to 17 years eight months in prison. In 2004, Macias was arrested for domestic violence. He was convicted of misdemeanor assault; he served 90 days in jail and six months for violating parole. In 2008, following another alleged incident of domestic violence, Macias pleaded no contest to felony evading and misdemeanor resisting arrest. He was sentenced to 25 years to life. Munoz-Sanchez reported several incidents of domestic violence before Macias was convicted in 2008.

In 2007 Macias called Munoz-Sanchez and threatened her if he could not see his daughter. She obtained a three-year restraining order against him. Macias continued to threaten Munoz-Sanchez after he was imprisoned. In 2012 she requested another restraining order after Macias wrote and called her, and then sent threats through family members. The court denied the request because Macias was in prison. In 2013, Macias' mother died and the threats subsided.

In 2015 their daughter A.M. asked to change her last name to Munoz. After Macias was served with the paperwork for the name change, his threats resumed. Macias' sister-in-law relayed a message to Munoz-Sanchez from Macias. He said he would be out in two to four years and would "take care of shit himself." He had someone on the outside helping him and " 'Mutha Fuckers' " would be surprised when he crept up

on them. Munoz-Sanchez understood the threat to be against her and her family. She was concerned that Macias would be released from prison due to changes in the law.

On July 15, 2015, Munoz-Sanchez requested a DVRO against Macias. Macias objected that he was given only one-day notice of the hearing and requested dismissal. In his objection, Macias "deeply pleads with this Honorable Court to bring Macias forward to testify before this Honorable Court." Macias' objection also included a response to the request for a DVRO. He did not agree with the orders requested, contending the request was without factual support; he asserted that he was not able to contact Munoz-Sanchez and had made no threats. He requested visitation with his daughter.

The trial court (McBrien, J.) initially denied the request for a DVRO. The court indicated more information was needed and the mandatory local incident form should be used. The denial indicated all papers should be filed at least five days before the hearing.

The matter was continued to August 12. Munoz-Sanchez filed the local form, detailing the alleged abuse. Macias was served on August 4. The record does not indicate that he contacted the trial court regarding appearing telephonically or arranging for counsel. The record reflects no contact from him to the court during the time period between service and the hearing.

The hearing on August 12 was held before an assigned temporary judge, a court commissioner. Macias did not appear and no counsel represented him. Munoz-Sanchez was sworn and testified, and the court read Macias' earlier response to the request for a DVRO. The court found the evidence sufficient to support a DVRO. The court issued a five-year restraining order prohibiting Macias from contacting Munoz-Sanchez or her children, directly or indirectly. This order was served on Macias on August 18.

Macias appealed.

DISCUSSION

I

Standard of Review

We review the court's issuance of a DVRO for an abuse of discretion. (*J.J. v. M.F.* (2014) 223 Cal.App.4th 968, 975.) But where a legal question is presented in the review of a discretionary decision, we review that issue de novo. (*Optimal Markets, Inc. v. Salant* (2013) 221 Cal.App.4th 912, 921-922.)

Macias, as appellant, had the burden to provide a sufficient record to affirmatively show error. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200.) Here, there is no transcript of the hearing, so we presume that what occurred at that hearing supports the judgment. (*Id.* at p. 1201.) " 'A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Macias represented himself in opposing the DVRO and continues to represent himself on appeal.[1] His status as a party appearing in propria persona accords him no special consideration. "A self-represented party is to be treated like any other party and is entitled to the same, but no greater, consideration than other litigants having attorneys." (*Elena S. v. Kroutik* (2016) 247 Cal.App.4th 570, 574.)

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[1] The record indicates that the first time Macias requested appointment of counsel to assist in this matter was in his opening brief, where he requested counsel for "all future matters."

II

Authority of Temporary Judge

The August 12 hearing was before a court commissioner. A commissioner is empowered as temporary judge on "stipulation of the parties litigant." (Cal. Const., art. VI, § 21; Code Civ. Proc., § 259, subd. (d).) Macias contends the court commissioner had no authority to hear the request for a DVRO because he did not so stipulate.

Macias relies on *Michaels v. Turk* (2015) 239 Cal.App.4th 1411 and *Ross v. Figueroa* (2006) 139 Cal.App.4th 856. These cases are distinguishable. In *Michaels*, the court reversed a restraining order because the self-represented defendant had not stipulated to a commissioner presiding over the hearing. (*Michaels*, at p. 1414.) The court noted the Riverside County local rule stated that while a stipulation is implied in cases of default and uncontested matters, self-represented parties " 'will be asked on the record if they so stipulate.' " (*Id.* at p. 1416.) Macias identifies no similar local rule here requiring an express stipulation on the record by a self-represented party. In *Ross*, a permanent restraining order was reversed because the defendant was denied the continuance to which he had a statutory right; further, he was denied the opportunity to be heard. (*Ross*, at pp. 865-867.) Here, the matter was continued to provide Macias with sufficient notice and the trial court *did* consider his written opposition.

Macias' stipulation to a temporary judge was required *only* if he was a party litigant. He lost that status by failing to appear or otherwise take part in the hearing after timely service of notice of the hearing. (*Lint v. Chisholm* (1981) 121 Cal.App.3d 615, 621) A party who fails to appear at a hearing and thus has defaulted is not a "party litigant." (*Sarracino v. Superior Court* (1974) 13 Cal.3d 1, 10) "It has repeatedly been held that the term ' "parties litigant" means the parties who are taking part in the litigation,—those who have appeared therein.' [Citation.] A party who has notice of a proceeding but fails to appear or otherwise take part loses the status of party litigant. [Citation.] The parties who do appear and take part may thus stipulate to the appointment

of a temporary judge without the consent of the absent, nonlitigating parties." (*Reisman v. Shahverdian* (1984) 153 Cal.App.3d 1074, 1089.)

The record does not show that Munoz-Sanchez stipulated to use of a temporary judge, but her stipulation may have been oral and thus not reflected in the limited record before us. In *Elena S. v. Kroutik, supra,* 247 Cal.App.4th at pages 575-576, the reviewing court presumed the court commissioner properly obtained a stipulation before issuing a DVRO where there was no reporter's transcript or settled statement. We presume that this official duty was regularly performed (Evid. Code, § 664); we also presume that what occurred at the hearing supports the judgment. (*Hearn v. Howard, supra,* 177 Cal.App.4th at p. 1201.) Further, "a valid stipulation for purposes of the constitutional provision may arise as a result of the *conduct* of the parties." (*In re Horton* (1991) 54 Cal.3d 82, 91.) Munoz-Sanchez was represented by counsel and fully participated in the hearing; she was sworn and testified. Her conduct was " 'tantamount to a stipulation' that the commissioner was acting as a judge pro tempore." (*In re Mark L.* (1983) 34 Cal.3d 171, 178.)

In his reply brief, Macias contends he cannot be faulted for failing to appear at the hearing because he was incarcerated and had asked the court to bring him "forward to testify" before the court when he first became aware of the hearing. But given the nature of this particular proceeding, Macias had no right to be brought from prison to court. "Except in a few specified circumstances, a court has no statutory authority to command the Department of Corrections to transport a prisoner to a civil courtroom." (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 924.) The exceptions involve parental and marital rights of the inmate, which are not involved here, and even in those circumstances a prisoner's right to be brought to court is subject to the discretion of the court. (Pen. Code, § 2625.)

Macias has failed to establish that he was denied the means to protect his rights at the hearing. He was not denied appearance by counsel. Nothing in the record shows that

he asked for, or even qualified for, appointed counsel to represent him. Nor did he ever request to appear by telephone, although he is aware of that option. This is not a case like *Jameson v. Desta* (2009) 179 Cal.App.4th 672, where it was error to dismiss an action on the ground that the plaintiff inmate failed to appear telephonically at a case management conference and at a subsequent hearing on an order to show cause. In *Jameson,* "the record establishes that [the inmate] repeatedly made clear his desire to participate in all court proceedings and informed the court that he was not being allowed to do so. Under these circumstances, we conclude that the trial court erred in dismissing the action based on [the inmate's] failure to appear telephonically." (*Id.* at p. 675.) Also distinguishable is *Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468, 1484, where the inmate "repeatedly requested court orders to permit him to appear telephonically from prison." Here, by contrast, after Macias was timely served (on August 4) with notice of the August 12 hearing, he was silent until he appealed.

DISPOSITION

The judgment (order) is affirmed.

/s/
Duarte, J.

We concur:

/s/
Raye, P. J.

/s/
Nicholson, J.